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No. 500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA,
Petitioner,

v.

JACOB L. SHERWOOD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT.

Statement.

Respondent herein is a judgment-creditor of one Kaiser by judgment obtained in the New York State Supreme Court, the judgment having been taken by default after personal service on Kaiser. Both respondent and Kaiser were and still are domiciled in the City of New York.

After the judgment was obtained, through examinations in supplementary proceedings of Kaiser, it was discovered that said Kaiser had entered into a contract with the United States for the construction of a Post Office at East Greenwich, R. I. It also appeared that the United States had cancelled Kaiser's contract under such circumstances as to create a probable cause of action against the United States.

Upon application to the New York State Supreme Court, and after presentation of the facts adduced from Kaiser's

testimony, an order was obtained under Section 795 of the Civil Practice Act authorizing respondent to maintain an action under the Tucker Act, 28 U. S. C., § 41 (20), 24 Stat. 505, against the United States of America for damages arising from the alleged breach of said contract.

In conformity with said order, the instant action was instituted by respondent against the United States of America and Frederick M. Kaiser, the latter being a necessary party defendant required under said Section 795.

Upon the Government's motion in the District Court, the complaint was dismissed (R. 20). On appeal from the order of dismissal, the Court below reversed, with opinion (R. 21-30), reported in 112 F. (2d) 587.

Summary of Argument.

I.

A. The instant action has been properly brought under the Tucker Act. The basis of jurisdiction in the present case would be unquestioned if the present action had been brought by Kaiser instead of respondent. Petitioner contends that the jurisdiction of the District Court is ousted by reason of the fact that the cause of action is now pursued by a judgment-creditor under authorization of the State Court acting under statute, New York Civil Practice Act, § 795.

The action brought is on a single claim against the Government, requiring adjudication of the merits of that claim alone. Contrary to the Government's arguments, there are no issues which remain between respondent and Kaiser as the State Court judgment remains decisive of their status. Counsel for the Government has patently misconstrued the Circuit Court's opinion which states that the alleged debtor of the judgment-debtor is entitled to attack the validity of the order authorizing supplementary proceedings (R. 30). This refers to respondent's right or

title to the cause of action, but in like manner the title or right to a claim against the United States of any third party might be put in issue. As between Sherwood and Kaiser, however, it is a fundamental principle of law, whose application is here conclusive, that a judgment rendered by a Court having proper jurisdiction cannot be collaterally attacked. Where the State Court has the facts before it and may demand any further proof it deems necessary, the order entered permitting the action to be brought by the respondent precludes any question as to the propriety of the action as between judgment-creditor and judgment-debtor.

In any event, the Government's position remains unembarrassed by multiple claims. Under the terms of the order, no other but respondent may enforce it. The reason for making the judgment-debtor a party defendant is to protect him with reference to the amount above the judgment-creditor's claim and to conclude his interest after rendition of judgment.

The present action is not merely a continuation of supplementary proceedings in another court, for here a new and independent cause of action is asserted, having no relation to the judgment which has been obtained against the judgment-debtor, but designed to give the creditor an effective means of pursuing a separate and distinct cause of action of the judgment-debtor.

B. The New Rules of Federal Procedure clearly permit the course here followed. While the Rules do not enlarge the District Court's jurisdiction to entertain suits against the United States, they modify the procedure under which suits may be brought.

Rule 17 (b) gives effect to the procedure employed by affirming respondent's right to sue by reason of the State statute. Respondent's capacity to bring the suit is thus explicit and so remains unless over-ridden by considerations of policy. Petitioner now agrees that the Rules apply to Tucker Act cases, conceding that *Lynn* v. *United States*, 110 F. (2d) 586, is erroneous in holding otherwise.

II.

The present action does not come within the prohibition of R. S., § 3477. The decisions of this Court and the opinion in the Court below affirm respondent's position that the present action, insofar as it is based on any transfer, is concerned with a transfer by operation of law and therefore not made void by the statute.

Petitioner complains that the Government would be embarrassed by the fact that a third party would be suing the Government on a matter in which the Government could not counterclaim or set off any damages it might have against Kaiser, the judgment-debtor. If this argument were sound it would apply with equal force to any case where a claim had been transferred to a third party by operation of law. Furthermore, in the case at bar the provision of the New York statute making the judgment-debtor a party defendant precludes such objection for any such claims existing could be set forth and adjudicated in the same suit. That very possibility was given full consideration by the Court below in suggesting the judicial economy of a consolidation where the United States had already commenced an action against Kaiser.

The policy of the statute is directed against trafficking in claims against the Government, and a transfer by Court order cannot be considered a violation of this principle. This is particularly true where, as under Section 795, jurisdiction is not complete without making the judgment-debtor a party, so that the Government would have full opportunity to enforce any claims it might allege against the original holder of the claim.

III.

The word "person" under Section 795 includes the sovereign. The intendment of Section 795, in view of its purpose, and as treated in related judicial interpretation,

is that both the State and the Government are contemplated thereunder.

I

The action is within the jurisdiction of the District Court under the Tucker Act.

A

AN ACTION BROUGHT UNDER SECTION 795 OF THE NEW YORK CIVIL PRACTICE ACT IS NOT INCONSISTENT WITH THE PROVISIONS OF THE TUCKER ACT.

The New York State Legislature first enacted Section 795 in 1935 in order to give wide powers to a judgment-creditor seeking to pursue a judgment-debtor's claim.[1] The State Court, acting thereunder, upon proof satisfactory to it, could thus empower a judgment-creditor to commence an action against the third person. Such a procedure is not, as petitioner contends, merely a continuation in another guise and in another Court of supplementary proceedings. Rather it is in the nature of an action by a judgment-creditor setting forth an independent cause of action in his name, with the additional requirement that the judgment-debtor be named as a party defendant.

If the judgment-debtor herein, Kaiser, had proceeded in the first instance to sue the United States in his own name, the jurisdictional question would not be raised. Petitioner rests its present objections to the District Court's jurisdiction on the form of the action now brought. The opinion of the Court below so succinctly distinguishes

1. New York Laws 1935, c. 630, known as the Buckley-Holley Act included this section. Section 795 was adopted from Section 792a, New York Laws 1934, c. 645.

The old practice of a creditor's bill in chancery was displaced by supplementary proceedings permitting action by a receiver and under the present statute, in proper case, by the judgment-creditor himself.

the procedural problem involved from the jurisdictional that we respectfully set forth its ruling (R. 25):

> "* * * a distinction should be made between the grant of power to adjudicate a claim against the United States and the manner or procedure by which that power shall be exercised. The statutory provision here, 28 U. S. C. A. § 41 (20), 24 Stat. 505, allows the district court to hear claims 'upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.' This is a general grant of power in the circumstances stated, without limitation as to procedure. Indeed, the statute quoted above, 28 U. S. C. A. § 761, contemplates differences in practice in the two courts. Limitations on procedure in the court of claims, therefore, cannot be jurisdictional defects in the district courts."

While the Tucker Act confers upon the District Courts concurrent jurisdiction with the Court of Claims, 28 U. S. C. A., § 761 indicates the different procedure applicable to the different courts. It is not contended by petitioner that the present claim is not justiciable under the Act, but objection is founded, first, on matters of policy which would rule out a suit by a judgment-creditor, and second, on the alleged failure of the present case to conform to the usual pattern of actions against the Government. As to the former, we shall show that the procedure in the instant case is in full accord with federal policy, and, as to the latter, that the propriety of the form of the action is fully supported by the procedural rules applicable. Under the present point, the right of a judgment-creditor to bring the action by virtue of § 795 of the Civil Practice Act will be discussed.

1. Primary among petitioner's objections is the contention that since the Tucker Act contemplates the single

issue of the liability on the claim against the United States, where a judgment-creditor brings the proceeding, the District Court's jurisdiction must necessarily fall. The Government asserts that issues still remain between the judgment-creditor and the judgment-debtor which must be determined in the present action. In support, petitioner states that the Court below actually adjudicated the issue of the validity of the order authorizing the supplementary proceedings. This, however, is clearly not an issue between judgment-creditor and judgment-debtor, but goes to the basis of the respondent's right or title to bring the present action. As between the judgment-creditor and the judgment-debtor, it is a well-established principle that the judgment or decree of a court of record which has acquired jurisdiction of the subject matter and of the parties cannot be collaterally attacked. *Cuff* v. *United States,* 64 F. (2d) 624. Certiorari denied, 290 U. S. 676; *Jeffery* v. *Selwyn,* 220 N. Y. 77, 84.

If petitioner's argument were upheld, it would constitute an insurmountable objection to all third persons who have any right or title to a claim against the United States, whether acquired by Court order, transferred by a Trustee in Bankruptcy, or bought in at a judicial sale. In all such instances the Government could contest the validity of the judicial proceedings forming the basis of claimant's right of action, but this has not been considered ground for denying such third persons the right to pursue such claims.[2]

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2. In petitioner's discussion of *Western Pacific R.R. Co.* v. *United States,* 268 U. S. 271 (Pet. Br. p. 47), it is admitted "that the purchaser at such a judicial sale does not necessarily succeed to all the liabilities of the original claimant". Although petitioner denies the possibility of a suit on such claim before any counterclaim by the United States might be resolved, no question was raised as to the validity of the transfer on that ground. Indeed the Court at page 275 speaks of "the sale to the claimant of so much of the claims as had accrued to the receivers"—a clear indication that a final determination of claimant's status was not had.
Also, see infra, pp. 16, 17.

2. Petitioner raises the further objection that supplementary proceedings in aid of execution of the judgment of one Court will not be countenanced in a court of another jurisdiction. The cases cited thereunder (Pet. Br. p. 34) proceed upon the theory of a creditor's bill in equity to recover moneys in another jurisdiction on either a statutory liability of the stockholders or some similar equitable liability. The cases of *Rocky Mountain National Bank* v. *Bliss,* 89 N. Y. 338; *National Tube Works Co.* v. *Ballou,* 146 U. S. 517; *Claflin* v. *McDermott,* 12 Fed. 375, and *Walser* v. *Seligman,* 13 Fed. 415, all hold that the creditor must recover judgment and issue execution in the State where the third party resides before the bill will lie. The refusal to entertain the suits was not based on any question of jurisdiction, but the failure of the creditors to fulfil certain procedural requirements, as a condition precedent to the actions.

The old New York cases were split on the question of whether or not a New York Federal Court judgment could form the basis of a judgment-creditor's action in the State Courts. (See *Davis* v. *Bruns,* 23 Hun [N. Y.] 648; *Tarbell* v. *Griggs,* 3 Paige [N. Y.] 207, holding the action improper; *Wilkinson* v. *Yale,* 6 McLean (N. Y.) 16, contra.) The Federal rule, however, holds that a State Court judgment is sufficient basis for a creditor's bill in the Federal Courts within the jurisdiction. *Feidler* v. *Bartleson,* 161 Fed. 30 (C. C. A. 9th).

3. Petitioner argues that it is entitled to attempt to settle the claims and cross-claims with respect to Kaiser's contract without any meddling by respondent and that respondent having everything to gain and nothing to lose by pursuing the action thereby assumes an obnoxious position. Agreed, that where the Government itself has brought suit, it ordinarily would be to respondent's advantage to pursue the cause of action, and in so doing prevent any settlement between petitioner and Kaiser.[3] But we

3. This would not be strictly true if petitioner would admit a balance due Kaiser, since it might then be in respondent's interest to attempt a settlement. Also see footnote 2 and infra, page 15.

cannot accept the plea that a possible added difficulty to the settlement of the claim can be considered a legal argument against invoking the District Court's jurisdiction.

4. The Government further poses the problem as to the method of entering judgment in the present action, assuming the respondent would prevail. The United States is primarily concerned with the disposal of any claim against it in one action which will remain res adjudicata as to the parties. Sherwood, by Court order, has sole control of the action and any other disposition of the claim has been enjoined. Petitioner does not suggest in its brief that such a conclusive adjudication would not result after a trial in the present case. Any question with regard to a cause of action arising from Kaiser's contract asserted by either party would be disposed of with finality and be res adjudicata. The entire cause of action being in respondent's name, the judgment would be in his favor alone and the District Court would have sole power to enter its own judgment, Section 795 containing no directory provisions in that respect. If necessary, a subsequent State Court order could be entered further disposing of moneys in respondent's hands.

5. Petitioner places great stress on its view that the instant action is in effect a garnishment proceeding and thus outside the realm of Tucker Act jurisdiction. Even assuming that the instant action can be treated as a garnishment, which we do not concede, the Court below most ably reasoned that once consent to be sued is established, the form of suit holds no objection (R. 27).

The extension of the principal of *Federal Housing Administration* v. *Burr*, 309 U. S. 242, to the instant case, it is averred, would subject the United States itself to garnishment as well as governmental corporations. That the applicability of the term "garnishment" to the present action is extremely doubtful, the Court below has shown (R. 27, 28). It is beyond dispute that the present action seeks to establish an independent claim of Kaiser's thus

differing from the ordinary meaning of garnishment. The circumstance that in so proceeding, the Government is sued, cannot be deemed objectionable, since this method of realizing on assets has been upheld when the claim is against the Government as well as in other cases (*Western Pacific R.R. Co.* v. *United States,* 268 U. S. 271).

The more persuasive analogy to Sherwood's position is found in that of a receiver who is given statutory power to bring suit against third-party debtors. The full recognition accorded to such a plaintiff was demonstrated by the decision of this Court in *Converse* v. *Hamilton,* 224 U. S. 243. There an action had been brought by a statutory receiver appointed in Minnesota under a judgment obtained there against a stockholder in the Wisconsin courts in an attempt to enforce the stockholder's liability under an assessment. The highest court of Wisconsin having dismissed the action on the ground that the State statute under which the receiver was appointed could not have extraterritorial force, this Court heard the appeal. In reversing, the Court held that the order appointing the receiver was entitled to full faith and credit, stating at page 255:

> "3. Under this statute, as interpreted by the Supreme Court of the State, as also by this court, the receiver is not an ordinary Chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders and with full authority to enforce the same in any court of competent jurisdiction in the State or elsewhere. * * * "

The import of this decision applies with equal force whether or not title to the claim has been transferred. The patent objective of Section 795 being to clothe Sherwood with the right to bring the third party action, and full authority being thereby conferred, his standing must be recognized.

B

THE NEW RULES OF FEDERAL PROCEDURE ESTABLISH RESPONDENT'S RIGHT TO SUE AND THE CONSENT OF THE PETITIONER TO THE SUIT AS BROUGHT.

Rule 17 (b) states:

> "Capacity to sue or be sued.—The capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of domicile. * * * "

In consonance with this provision, the lower Court held that the right of respondent to sue as a judgment-creditor is thereby confirmed since the United States consents to the suit in the manner prescribed by New York law. The Court notes the various provisions of the Rules showing clearly that the United States as a party was fully contemplated thereunder, and its rights specially protected (R. 23). Petitioner, too, has now concluded that *Lynn* v. *United States,* 110 F. (2d) 586 (C. C. A. 5th), is erroneous in holding that the Rules are not applicable to actions under the Tucker Act (Pet. Br. p. 31). It asserts, nevertheless, that questions arise out of the form of action, which, irrespective of the Rules, must be resolved in its favor.

1. The first problem deals with the right of plaintiff to maintain the present action. On this count, the argument is made that Rule 17 (b) does not refer to the substantive right of a third person to maintain an action, having reference, rather, to disqualifications of infancy, insanity, alienage and the like. Such an argument would seem without basis upon a consideration of the context. The capacity of a corporation to sue or be sued is set forth thereunder as well as a particular provision enabling a partnership to sue in its common name.

Bicknell v. *Lloyd-Smith,* 109 F. (2d) 527 (C. C. A. 2d), discusses the effect of this section of the Rules upon the

capacity of a receiver to sue. In that case a receiver, appointed under a Michigan statute, sued in the federal district Court of New York, without ancillary appointment in that State. The Court held that by virtue of Rule 17 (b) the action was well brought, since the law of New York permitted a foreign receiver to sue without ancillary appointment, contrary to the Federal practice. In so holding, the Court gives added support to the opinion below where Sherwood acts under a Court order with specific authorization to bring the action.[4]

Petitioner disputes the view of the Court below which indicates consent to the suit by virtue of Rule 17 (b). The right to obtain an order under Section 795 is dependent on a judgment obtained in New York. N. Y. Civil Practice Act, Sec. 773. The question of capacity to sue in the District Courts would then be determined by the law of the judgment-creditor's domicile which would not necessarily be in conflict with New York law. In any event, no anomalous situation would result as petitioner infers.[5]

The consent which the Court below found in the Rules is apart from the recognition which must be accorded Sherwood's position under the doctrine of *Converse* v. *Hamilton,* supra, heretofore considered.

2. The second question concerns the effect of the rules on the joinder of Kaiser as a party defendant with the United States. The jurisdiction of the District Court to determine the claim having been shown, the procedural

4. Other recent cases supporting our view with respect to Rule 17(b) are:

Ballard v. *United Distillers Co., Inc.,* 28 F. Supp. 633;
Pirnie v. *Andrews,* 30 F. Supp. 157;
Alston v. *School Board of City of Norfolk,* 112 F. (2d) 992 (C. C. A. 4th).

The first two cases refer the right of administrators or executors to sue, or be sued, in the federal court of another state, to state law, while the last holds that a voluntary unincorporated association can be sued in its common name.

5. Petitioner's Brief, pages 32, 33; footnote 19.

problem must be answered by the rules pertinent thereto. Primarily, of course, the Conformity Act, 28 U. S. C., § 724, would undertake to conform the federal practice to the procedure outlined by state law. Furthermore, under Rule 19(a) the wide latitude permitted in joinder of parties, even to the extent of permitting the joinder of an involuntary party plaintiff, supports the practice in the case at bar.

Petitioner cites various cases (Pet. Br. p. 16) in the Court of Claims to illustrate the argument that there can be no added party defendant. These cases, without exception, involved additional parties whose rights were at variance with the claimant's, and therefore involved separate issues which the Court of Claims was not enabled by its statutory powers to adjudicate. Thus, the case of *Waite* v. *U. S.*, 57 C. Cls. 549, concerned a third party's attempt to intervene to assert its claim on certain patent rights. The motion was denied on the ground that no provision for intervening parties is made in the Act. Yet, it is highly significant that the present rules of the Court of Claims do provide for intervening parties in certain instances.[6]

Leather & Leigh v. *United States,* 61 C. Cls. 388, and *Jackson* v. *United States,* 27 C. Cls. 74, involved the dismissal of petitions seeking equitable relief not afforded

6. Rules of the Court of Claims of the United States 18 (a) and (b) read as follows:

18 (a). After the filing of a case transmitted to the court by the head of an executive department or by Congress or either House thereof, any person directly interested in the case may appear as a party therein by filing a printed petition, under oath, in accordance with Rules 1 and 8 to 17, inclusive. Such petition shall be filed within 6 months from the filing of the case in this court, and shall not be filed thereafter except by leave of court.

(b). Any person claiming to be in lirectly interested in any question involved in such case may appear and be heard on the one side or the other, as his interest may require, upon filing a printed petition, under oath, setting forth specifically and concisely how he claims to be interested, and submitting the questions raised to the decision of the court.

by the Court of Claims' jurisdictional power. However, joinder of Kaiser here would not instill new issues nor affect the District Court's jurisdiction. The broad procedural province of the District Court and the rules governing actions therein fully support the procedure herein followed.

Naming Kaiser as a party defendant does not alter or destroy the underlying purpose of the Tucker Act. Indeed, this procedural requirement seems particularly advantageous in that Kaiser is before the Court subject to any counterclaim the United States may wish to assert. Thus, all the issues could be determined in a single action, a result which the Court below so strongly urged in support of the propriety of the original consolidation had herein (R. 22). Clearly, when the sole issue for adjudication is the question of the breach of Kaiser's contract, the action does not run counter to either the language or purport of the Act.

II

The present action does not come within the prohibition of R. S. § 3477.

Respondent herein brings the present action by order of the State Court authorizing him to maintain the action against petitioner. In so proceeding under the order, respondent acts as an agent of the Court, the entire claim and cause of action being in the custody of the Court. Whatever may be realized on the claim would be distributed under Court order to creditors entitled thereto, or if a balance remained, to Kaiser himself.

The principle is clear that if a transfer is made by operation of law, the claim brought thereon is not in violation of R. S. § 3477, a doctrine enunciated in *Erwin v. United States*, 97 U. S. 392, and numerous cases thereafter.

Petitioner apparently does not regard the question of transfer by operation of law as all-important, but rather dwells on the dominant purposes of R. S. § 3477, claimed to be violated by Sherwood's action. These purposes, it is maintained, are to prevent the Government from being harassed by multiplying the number of persons with whom it must deal and from being involved in conflicting claims.

To support its position petitioner again argues that because of the form of the present action, the Government must deal with Kaiser as well as respondent. Respondent, it should be pointed out, is the only person authorized to pursue this claim against the United States, and it is with him alone that the Government has to deal. To assume otherwise would be to make the order of the State Court a nullity. The Government, furthermore, ignores the practical consideration which is raised by the facts in the instant case, namely, that suit has been brought against Kaiser and his surety (R. 5-6) claiming a breach of contract, at the same time that the present action is pending. If these actions were consolidated in conformity with the suggestion of the Court below, the single issue would be raised of whether the Government or Kaiser was guilty of the breach. Once this had been decided, damages necessarily flowing therefrom would be determined. Petitioner, however, would not be content with such a result, for, because of respondent's position in the melee, the possibility of compromise with the surety, assuming Kaiser to be judgment proof, becomes highly questionable.

We seriously doubt whether the fact that the Government would have more difficulty in settling a claim because of its own action can be considered as a valid legal reason for application of the statute. By commencing an action against Kaiser and his surety, clearly the Government considers its case a meritorious one, and, consequently, sees no merit in the present action. The difficulty of settlement here surely does not constitute an

interference "with the examination and allowance or rejection of such claim", nor otherwise obstruct legal action by officers of the Government, referred to by petitioner in its brief, page 48, in the citation from *Price* v. *Forrest*, 173 U. S. 410.

It will be seen from petitioner's discussion of *Western Pacific R.R. Co.* v. *United States*, 268 U. S. 271 (Pet. Br. p. 47, fn. 21), that the purchaser of the assets at a judicial sale does not necessarily succeed to all the liabilities of the original claimant. Would not this very argument which the Government now raises be applicable to the facts in the *Western Pacific* case? The purchaser in that case bought in at the receiver's sale only so much of the claims against the United States as had accrued to the receiver. No reason is given why the purchaser would have been subject to counterclaims by the Government, yet the Court saw no objection to the action as there brought.

The true purpose of R. S. § 3477 is set forth in the *Western Pacific R.R.* case, supra, the Court stating at page 275:

> "* * * The object of this section is to protect the Government and prevent frauds upon the Treasury. It applies only to cases of voluntary assignment of demands against the Government, and does not embrace cases where there has been a transfer of title by operation of law. United States v. Gillis, 95 U. S. 407, 416; Erwin v. United States, 97 U. S. 392, 397; Goodman v. Niblack, 102 U. S. 556, 560; Price v. Forrest, 173 U. S. 410, 421. And see Seaboard Air Line v. United States, 256 U. S. 655, 657. In Price v. Forrest, supra, p. 422, it was specifically held that this section did not apply to the assignment of a claim to a receiver under the order of a court, this being 'the act of the law'. So here the sale to the claimant of so much of the claims as had accrued to the receivers for transportation furnished by them was clearly a transfer by operation of law and did not come within the prohibition of the statute."

As in the *Western Pacific* case, the claim in the case of *In re Pottasch Bros. Co.*, 79 F. (2d) 613 (C. C. A. 2d), had likewise not yet been allowed when the transfer was made. From a careful reading of the opinion in the District Court it will be seen that the validity of a transfer by the Trustee in Bankruptcy of the claims against the United States at a time when they had not yet been allowed had been called into question.[7] Nevertheless, both in the first instance and on appeal R. S. § 3477 was held inapplicable.

In the aforementioned cases the Courts did not point out any necessity for a complete transfer of all of the claimant's property to the third party or indicate a requirement that the claims be allowed by the Government at the time of the transactions. See, also, *Bray* v. *United States Fidelity & Guaranty Co.*, 267 Fed. 533, *In re Gerstenzang*, 5 F. Supp. 904.

Any question as to whether or not the order of a State Court is of the same juridic effect as an order of a Federal Court was resolved in the case of *Price* v. *Forrest*, 173 U. S. 410. That case involved a suit on a claim which, while it had already been allowed, had been transferred by an order of the State Court of New Jersey. This Court held that the order thus made was not a violation of the statute, the opinion reading at pages 424, 425 as follows:

> "It only remains to say touching this part of the case that if Section 3477 does not embrace the passing or transfer of claims to heirs, devisees or assignees in bankruptcy, as held in Erwin v. U. S., nor a voluntary assignment by a debtor of his effects for the benefit of his creditors, as held in

7. The lower's Court's decision in *In Re Pottasch Bros. Co.*, 11 F. Supp. 275, at page 276, states:

> "At the time of these transactions the Trustee had no knowledge of the existence of the bankrupt's claims against the United States, beyond the constructive notice given by the proof of claim filed by the Central Illinois Company. * * * Later it was learned that the claims against the United States had been allowed."

Goodman v. Niblack, it is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver to be held subject to the order of Court for the benefit of those entitled thereto can be regarded as prohibited by that section."

The purpose of R. S. § 3477 has been shown to be twofold: Firstly, to prevent such trafficking in claims of the Government which would permit transfer without orderly legal procedure, and secondly, to prevent a multiple assertion of claims. Neither of these fundamentals have been violated in the proceedings in the case at bar.

III

The word "person" under Section 795 includes the sovereign.

We believe that the opinion in the Court below (R. 29-30) on this point is both authoritative and decisive, requiring little comment here. The fallacy must be pointed out, however, in the attempt made by the Government to relate decisions respecting Section 684 of the Civil Practice Act to the present action. Section 684, as amended in 1935, now permits the garnishment of moneys due City and State employees and is quite properly held not to apply to the employees of the United States. This is the inevitable result where there is no Federal statute providing for such garnishment, nor any waiver of sovereign immunity. An action brought under the Tucker Act rests on a statutory consent which we have endeavored to show is applicable to the instant action. The remedial purpose of Section 795 can only be given effect if its incidence falls on the largest possible sphere. New York State statutory enactments show the unquestioned enlargement of the scope wherein a judgment-creditor may seek

relief, which now includes garnishment proceedings against State or Municipal employees, Civil Practice Act, Section 684. It follows as the necessary result of the object of the legislation, that the sovereign is included within the word "person" in Section 795.[8]

Nor can it be said that including the sovereign would "deprive the sovereign of a recognized or established prerogative, title or interest" under the holding of *Nardone* v. *United States*, 302 U. S. 379, 383. If this Court rules that this action is not violative of R. S., § 3477, such a finding would in effect hold that the Government cannot object to the claim because of any embarrassment to it or because of Sherwood's failure to establish his legal right to sue. Thus, the argument that no inroad is made on governmental prerogative by the inclusion would be strongly reinforced.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MILTON U. COPLAND,
DAVID MORGULAS.

8. The entire Article 45 of the N. Y. Civil Practice Act dealing with supplementary proceeding was repealed and replaced by a new article, L. 1935, Ch. 630.

APPENDIX.

28 U. S. C. A., § 761, states: The course of procedure for the district courts and the court of claims in cases under section 41, paragraph 20, and section 250 of this title, insofar as applicable and not inconsistent with sections 762 to 765, and the procedure prescribed for the court of claims shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

Rule 19(a) of the Federal Rules of Civil Procedure. Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

28 U. S. C., Sec. 724: The practice, pleadings and forms and mode of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of this State within which such district courts are held, any rule of court to the contrary notwithstanding.

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SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1940.

The United States of America, Petitioner, *vs.* Jacob L. Sherwood.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The New York Supreme Court, acting under authority of § 795 of the New York Civil Practice Act, made an order authorizing respondent, as a judgment creditor, to maintain a suit under the Tucker Act of March 3, 1887, 24 Stat. 505, § 24(20) of the Judicial Code, 28 U. S. C. § 41(20), to recover damages from the United States for breach of its contract with the judgment debtor. The question for decision is whether a United States District Court has jurisdiction to entertain the suit.

The order authorized respondent, who had recovered a judgment against Kaiser in the New York Supreme Court for $5,567.22, to bring suit against the Government to recover for breach of its contract with Kaiser for the construction of a postoffice building. The order directed that out of the amount recovered respondent should be entitled to a sum sufficient to satisfy his judgment with interest "as well as costs, disbursements and expenses which may be allowed by the court".

Respondent brought the present suit against the United States and Kaiser in the District Court for Eastern New York. By his complaint he set up the judgment and the order of the state court, the breach of contract by the United States, and the consequent damage to Kaiser in the sum of $14,448.49, and prayed judgment in the sum of $10,000. The order of the District Court dismissing the complaint for want of jurisdiction was reversed by the Circuit Court of Appeals for the Second Circuit, 112 F. (2d) 587, which held that under Rule 17(b) of the Federal Rules of Civil Procedure respondent's "capacity to sue" was governed by the law

of New York which was his domicile; and that the order of the state court had conferred authority upon respondent to maintain the suit, the United States being a "person indebted" within the meaning of §.795 of the Civil Practice Act which sanctions orders by the state court authorizing a suit by a judgment creditor against a "person . . . indebted to the judgment debtor". We granted certiorari November 18, 1940, the question of the jurisdiction of the District Court under the Tucker Act being of public importance.

The United States, as sovereign, is immune from suit save as it consents to be sued, *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Lee,* 106 U. S. 196; *Kansas* v. *United States,* 204 U. S. 331; *Minnesota* v. *United States,* 305 U. S. 382, 387; *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, 388; *United States* v. *Shaw,* 309 U. S. 495. See cases cited in *The Pesaro,* 277 F. 473, 474, *et seq.,* and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *Minnesota* v. *United States, supra,* 388 and cases cited; cf. *Stanley* v. *Schwalby,* 162 U. S. 255, 270. Jurisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims was conferred on the Court of Claims by Act of February 24, 1855, 10 Stat. 612. With additions not now material, the jurisdiction was continued by paragraph First of the Tucker Act of March 3, 1887, 24 Stat. 505, which, as supplemented and reenacted, is now § 145 of the Judicial Code, 28 U. S. C. § 250. Section 2 which, as supplemented and reenacted, is now § 24(20) of the Judicial Code, 28 U. S. C. § 41(20), confers jurisdiction on the district courts "Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded . . . . upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable . . ."

The Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power "to pay the debts . . . of the United States", which it is free to exercise through judicial as well as non-judicial agencies. See

Williams v. *United States*, 289 U. S. 553, 569, 579; *Ex parte Bakelite Corporation*, 279 U. S. 438, 452, *et seq.* It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims. *McElrath* v. *United States*, 102 U. S. 426; *Williams* v. *United States*, *supra*, 570, 571; *Ex parte Bakelite Corporation*, *supra*, 453.

Except as Congress has consented there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States, or for the review of its decisions by appellate courts. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 536, *et seq.* For that reason it has been uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States, *United States* v. *Alire*, 6 Wall. 573; *United States* v. *Jones*, 131 U. S. 1, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court. *United States* v. *Jones*, *supra*; *Lynn* v. *United States*, 110 F. (2d) 586, 588; *Leather & Leigh* v. *United States*, 61 Ct. Cl. 388, or if its maintenance against private parties is prerequisite to prosecution of the suit against the United States the suit must be dismissed. *Jackson* v. *United States*, 27 Ct. Cl. 74, 84; *Waite* v. *United States*, 57 Ct. Cl. 546; *Leather & Leigh* v. *United States*, *supra*; cf. *Turner's Case*, 248 U. S. 354; *Green* v. *Menominee Tribe*, 233 U. S. 558. See *Pacific Mutual Life Insurance Co.* v. *United States*, 44 F. (2d) 887, 888.

We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract. As the court below recognized, the judgment debtor, who is made a necessary party by § 795 of the Civil Practice Act, in any suit brought pursuant to the order of the state court is entitled to attack the validity of the order and of the judgment on which it is founded. See *Nankivel* v. *Omsk All Russian Government*, 237

N. Y. 150, 158. Adjudication of that issue is not within the jurisdiction of the Court of Claims whose authority, as we have seen, is narrowly restricted to the adjudication of suits brought against the Government alone.

But the question remains whether such a suit is nevertheless within the jurisdiction conferred by the Tucker Act on the district courts. The Court of Appeals thought that the obstacles to joining private parties, as parties defendant, in suits against the Government are procedural only, and that while no procedure is provided whereby the Court of Claims can adjudicate the rights of private parties in suits against the Government, that court is nevertheless free to adopt such a procedure. Cf. 28 U. S. C. § 263. In any case it thought such procedure has now been made applicable to suits in the district courts by the new rules of civil practice. It concluded that since the District Court, under the Tucker Act has jurisdiction to adjudicate claims against the United States and by virtue of other provisions of the Judicial Code has jurisdiction to adjudicate the issues between respondent and the judgment debtor, the Rules of Civil Procedure authorize the exercise of both jurisdictions in a single suit.

This conclusion presupposes that the United States, either by the rules of practice or by the Tucker Act or both, has given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated. But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.

Nor with due regard to the words of § 2 of the Tucker Act and to its legislative history can we say that the United States has consented to the maintenance of suits against the Government in the district courts which could not be maintained in the Court of Claims. The section must be interpreted in the light of its func-

tion in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted. *Schillinger* v. *United States,* 155 U. S. 163; *Price* v. *United States,* 174 U. S. 373; *United States* v. *Michel,* 282 U. S. 656; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *United States Fidelity & Guaranty Co.,* 309 U. S. 506; cf. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, 247. Section 2, authorizing suits against the Government in district courts, is an integral part of the statute, other sections of which revised and enlarged the classes of claims against the United States which could be litigated in the Court of Claims. It was the jurisdiction thus defined and established for that court which was extended by the section to the district courts in the specified instances, for in consenting to suits against the Government in the district courts, Congress prescribed that the jurisdiction thus conferred should be "concurrent" with that of the Court of Claims.

Construing the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity and in the light of the history of the Court of Claims' jurisdiction to which we have referred, we think that the Tucker Act did no more than authorize the District Court to sit as a court of claims and that the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims. See *United States* v. *Jones, supra,* 19; *United States* v. *Pfitsch,* 256 U. S. 547, 550; cf. *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 571. The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure which prescribe the methods by which the jurisdiction of the federal courts is to be exercised, but do not enlarge the jurisdiction.

The present litigation well illustrates the embarrassments which would attend the defense of suits brought against the Government if the jurisdiction of district courts were not deemed to be as restricted as is that of the Court of Claims. The Government, to protect its interests, must not only litigate the claim upon which it

has consented to be sued, but must make certain that respondent's right, as against the judgment debtor, to maintain the suit is properly adjudicated. And since the alleged claim for damages is larger than the $10,000 jurisdictional amount the Government must either be subjected to successive suits for partial recoveries of the amount due or must make certain that respondent has legal authority to relinquish the judgment debtor's claim in excess of $10,000, and that this has been accomplished by the limitation of his demand for judgment to that amount. See *Franklin* v. *United States*, 308 U. S. 516; *Otis Elevator Co.* v. *United States*, 18 F. Supp. 87. The Government's consent to litigate such issues is hardly to be inferred from its consent to be sued upon a claim for damages for breach of contract. Cf. *National Surety Co.* v. *Washington Iron Works*, 243 F. 260.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.